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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

12 CR 376

5 RUDY KURNIAWAN,

6 Defendant.

7 -----x

8 New York, N.Y.

9 May 29, 2014

10:00 A.M.

11 Before:

12 HON. RICHARD M. BERMAN,

13 District Judge

14 APPEARANCES

15 PREET BHARARA
16 United States Attorney for the
17 Southern District of New York

18 JASON HERNANDEZ
19 STANLEY OKULA
20 Assistant United States Attorneys

21 JEROME MOONEY
22 VINCENT S. VERDIRAMO
23 Attorneys for Defendant

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(Case called)

(In open court; defendant present)

THE DEPUTY CLERK: Please rise.

THE COURT: How are you, please be seated.

Okay, so nice to see you all.

As you know from my order dated May 27th, I didn't think I was ready to go forward with the sentencing today, because I as indicated in that order, there are some things that are missing and that would be helpful.

So, Mr. Hernandez, we had asked someone from probation to be here, particularly the people who prepare the presentence report. But, so far, no response. And we did send an e-mail, so maybe you could convey what I'm looking for, because I think in large measure it is the probation presentence report that has some gaps that I would like to try and fill in.

MR. HERNANDEZ: We'll do that, your Honor.

THE COURT: Great. Thanks so much.

So let me go over what they are, just so it's clear.

So the presentence report is helpful in the sense that it, you know, recounts much of the testimony and evidence adduced at trial. That's sort of less helpful at this stage.

Everyone knows -- having some more background on Mr. Kurniawan's motivation, personal history, interviews, et cetera, that's really -- I mean most of us know what happened at the trial. What we don't know is that. So I would like the

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1 probation department to -- and I would like them to do it
2 forthwith -- to try and develop a little bit more of that
3 information.

4 For example, they mentioned that Mr. Kurniawan's
5 mother is still living in the house in LA; is that right?

6 MR. MOONEY: Yes, your Honor. She still is. And
7 she's been expecting somebody to call her.

8 THE COURT: Yeah, me too.

9 MR. MOONEY: And as of yesterday, she had not been
10 contacted.

11 THE COURT: Yeah, I get that.

12 And so there is mention of the need for a Mandarin
13 interpreter, but I'm sure there are plenty available, and so
14 that should happen.

15 For example, she was, as we all know, also living
16 there at the time of Mr. Kurniawan's arrest. So she's
17 someone -- and as a mother, would have perhaps some insight.

18 So that would be helpful.

19 And what about other family members; brothers. Are
20 they amenable to being interviewed, or --

21 MR. MOONEY: Yes, your Honor. There are two brothers.
22 One of them speaks pretty good English. The other one has very
23 poor English. And we are gonna see what we can do to try to
24 make some connections to at least make that contact. They are
25 both located in Asia, but --

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1 THE COURT: What's the language that the one who
2 doesn't speak such good English is, principally?

3 MR. MOONEY: He would speak Indonesian. And Chinese.
4 They all speak Chinese.

5 THE COURT: Mandarin?

6 MR. MOONEY: Yes.

7 THE COURT: Perhaps the same interpreter for the
8 mother --

9 MR. MOONEY: That would be possible.

10 THE COURT: There are ways to fix that. And I think
11 it would make our job more easier.

12 MR. MOONEY: Okay.

13 THE COURT: So, okay then. This is in the presentence
14 report. You all are aware there is a net worth column of
15 8 million, plus. That can't be. Net worth is usually assets
16 minus liabilities. They didn't minus any liability. So that's
17 an incorrect statement. And it doesn't -- it's not just
18 technical. We need to know, for these issues of restitution
19 and forfeiture, et cetera, et cetera, what the numbers are.
20 And they don't add up in the presentence report, so we need
21 much more in depth. And perhaps that's something you can help
22 the probation department with.

23 MR. HERNANDEZ: We are happy to do that.

24 There are also assets, for example, that are not
25 accounted for in the report. So there are some gaps. And we

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1 have some resources that we can help probation to provide a
2 more complete report.

3 THE COURT: Great. And you're welcome, Mr. Mooney, to
4 weigh in on that process also.

5 MR. MOONEY: We'll see what we can do to help out with
6 that.

7 THE COURT: So then, as you know, the probation
8 department makes a recommendation that the sentence should be
9 below the guidelines sentence they computed. And, you know,
10 I'm happy to have their thoughts on the matter, but they really
11 don't explain why it goes from, presumably, from 168 to 120 and
12 not to 80 or some other number. I mean there is no rationale.
13 And that would be useful and helpful. The numbers, in and of
14 themselves, don't really tell us much. So that would be
15 important.

16 So does anybody know -- another matter, I have this
17 letter from William Koch. It is undated. Is there a date that
18 I should fix to that letter?

19 MR. HERNANDEZ: Your Honor, Mr. Koch's lawyers sent me
20 a copy of the letter with the date, May 22nd, which I can hand
21 up to your deputy.

22 THE COURT: Oh, great. I can substitute that letter
23 with the undated one.

24 MR. HERNANDEZ: You could. I think it's the exact
25 same letter, they just put the date on it.

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1 THE COURT: All right. So that's helpful.

2 And I'll make this part of the docket, his letter.

3 We'll post it, if it is not already posted.

4 There is reference in two places to Mr. Koch's letter,
5 presumably, to the Court. I don't think I have seen that.

6 MR. HERNANDEZ: Yes, your Honor, if I might bring that
7 forward.

8 THE COURT: Great. So we'll make that, also, a court
9 exhibit.

10 MR. HERNANDEZ: Thank you, your Honor.

11 THE COURT: Just for the record, Mr. Mooney, it is
12 dated 2014?

13 MR. MOONEY: That's correct, your Honor.

14 MR. HERNANDEZ: And I do --

15 THE COURT: Counsel, that --

16 MR. HERNANDEZ: I'm sure we are going to get inquiries
17 about this in our sentencing submission. We argued that
18 documents, such as these, if your Honor is going to rely on
19 them, should be part of the public record.

20 THE COURT: I usually say all submissions go on the
21 public record. So if they have not, I'll put them on there.
22 But you all should, too.

23 MR. HERNANDEZ: I ask only because these good people
24 here will call our press office as soon as this proceeding is
25 over, and they'll ask whether that is a public record. So it

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1 is helpful to have that clarification.

2 MR. MOONEY: We have no objection, your Honor. It's
3 been our practice to send those in through probation.

4 THE COURT: Yeah, no, I know.

5 MR. MOONEY: The way we usually do it, that's why it
6 happened that way.

7 THE COURT: I can confirm that those are three good
8 people, by the way.

9 So we'll -- yeah, we will put this on. And if you do
10 it, too, you know, it doesn't matter.

11 So, now, just to -- because this looks like a somewhat
12 more complicated issue, and from the materials as well, Mr.
13 Hernandez. Is it likely, or possible, or probable in this
14 case, that we'll have three different numbers; one for
15 restitution, one for forfeiture, one for actual and intended
16 loss.

17 Could you give us just a little preview of what you
18 think is happening there?

19 MR. HERNANDEZ: I do think, your Honor, we're going to
20 have, probably, three different numbers. The actual loss
21 represents the fake bottles that were sold. And intended loss,
22 as I'm sure your Honor knows, includes bottles, for example,
23 that were consigned, or withdrawn, or sales that were never
24 consummated. That's gonna be the largest number, because of
25 the inclusion of the intended loss.

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1 THE COURT: And that number is, among other reasons,
2 significant, because it drives the guideline range.

3 MR. HERNANDEZ: It does. But I'll make one
4 observation, which is that there is really only a two-point
5 difference in the guidelines range between the parties. The
6 government says, when you combine intended loss and actual
7 loss, it is between 20 and 50 million. And Mr. Mooney's most
8 recent submission says that the, you know, the actual loss or
9 maybe the total loss, is a little over 7 million.

10 THE COURT: Up to 20.

11 MR. HERNANDEZ: Up to 20, right.

12 So when you look at the guideline breakdown, the two
13 breaks are seven to twenty million and twenty to fifty. So
14 we're talking about a two-point difference. In the end, we'll
15 still obviously need to be accurate. And we're doing as best
16 we can because -- so you have the largest number of intended
17 and actual loss. Then you have the forfeiture number, which is
18 probably the second largest number. That's the proceeds gained
19 from the sale of the fake wines.

20 THE COURT: Right.

21 MR. HERNANDEZ: And then the last number, restitution,
22 is probably the smallest number, because there were people who
23 got refunds, for example. So Mr. Kurniawan would swap the
24 bottles and give them either some authentic wine or return
25 money, or an option house would.

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1 So in the area of restitution, to use the prime
2 example, William Koch, Mr. Koch, decided not to return his
3 bottles. He has estimated he has 2.1 million or so fake
4 bottles that he bought from Mr. Kurniawan. He would be
5 eligible for restitution in that amount.

6 THE COURT: So if he decides, for example, not to
7 return them, but he's still entitled to restitution? I mean if
8 he returned them, he would get -- presumably, he would get
9 something for them, no?

10 MR. HERNANDEZ: Well, he would get pennies on the
11 dollar, I think is fair to say, certainly, at this point. I
12 don't know what would have happened if he returned them in
13 2006. But there are -- certainly are arguments that they are
14 worthless. So I don't know that anyone is going to return them
15 or accept them at this point.

16 There is also evidence in his civil suit against Mr.
17 Kurniawan, there are all sorts of reasons, there are other
18 people who, for different reasons, have kept their bottles, as
19 well. And what we have attempted to do, although it is
20 difficult to do -- because not everyone is as transparent as
21 Mr. Koch, or willing to put their information on the line -- is
22 to look at what other victims have had in terms of their
23 losses. And some have had, Mr. Eagan, the expert who
24 testified, looked through cellars and created their lists.
25 Some are not as precise. And we tried to be conservative in

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1 that regard.

2 There are a handful of people who bought in excess of
3 \$10 million of wine, combined. All of the very, very likely
4 counterfeited kinds of wines. The rarest. The most expensive.
5 The large formats. And those people are much more hesitant to
6 come forward. We could subpoena those people and say show us
7 what you bought and let's -- we could subpoena and say give us
8 the bottles. But then we would have to take months and a lot
9 of dollars to then go through their wines to estimate the loss
10 amount, which is probably not a wise use of resources.

11 So given that there is a two-point difference here,
12 and for restitution purposes we'll only submit a restitution
13 request for victims that have provided some form of
14 documentation for their losses, it's gonna be the smallest
15 number.

16 THE COURT: So stay on that for a moment.

17 So the two-point difference gets you -- what are the
18 two guideline ranges that -- that result from that two-point
19 difference?

20 MR. HERNANDEZ: Sure, I wrote them down on the
21 presentence report. If you give me a second, I can flip to
22 that.

23 THE COURT: One is the 165 to -- I think it's --
24 that's what it is.

25 MR. HERNANDEZ: Right. That's the range that the

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1 probation and the government have. That's at a level 35. And
2 then at a level 33, which is the two-point difference for loss,
3 the range is 135 to 168.

4 THE COURT: I see.

5 MR. MOONEY: And that's if you just go from the
6 presentence report, your Honor. There are some other issues
7 obviously unrelated to loss.

8 THE COURT: Right, right, right.

9 MR. MOONEY: Okay. And I might add that with regard
10 to the restitution issue, the defense, we are in litigation
11 with Mr. Koch. So we have conversations there. But we have
12 also been trying to reach out to some of the other people we
13 know about, try to work out whatever differences there might be
14 in regards to what those people are entitled to, and get them
15 some money, if possible.

16 THE COURT: Right.

17 Now, are those situations going to be netted out, so
18 to speak, before we get to fixing the restitution number here.
19 Because I guess if somebody got paid, he wouldn't -- wouldn't
20 need restitution. So I noticed --

21 MR. HERNANDEZ: Right.

22 THE COURT: -- in the government's submission, there
23 is a whole series of people who got reimbursed from, I don't
24 know --

25 MR. HERNANDEZ: Right. We wouldn't submit restitution

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1 orders for those individuals. But it is in there, included
2 because it's intended loss. It shows you how much they bought,
3 they got to return it, but --

4 MR. MOONEY: I do not know, your Honor, whether we'll
5 have those things wrapped up and settled. I mean it is really
6 quite fascinating, even with the numbers being where they are,
7 the difficulty we are having getting some people to even want
8 to talk about it.

9 THE COURT: You mean buyers?

10 MR. MOONEY: Yes, your Honor.

11 THE COURT: Yeah.

12 MR. MOONEY: People we want to give money to.

13 THE COURT: Right.

14 So we have to figure out how we're going to go about
15 dealing with that. And one thing -- just as a heads up -- I
16 like to do. Sometimes we get to sentencing and then somebody
17 will say, well, Judge, we'll have the restitution within 90
18 days. I want to have it before the sentencing so that we can
19 really wrap things up. So that will mean, as best it can be,
20 Mr. Hernandez, we'll need the list of names, how much they get,
21 addresses, where the restitution goes to, all of that. And to
22 the extent that you and Mr. Mooney can agree on that, obviously
23 that would be ideal, the greater extent the agreement, the
24 better it will be.

25 MR. HERNANDEZ: We'll work to eliminate whatever

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1 disagreements there are. If there are, we'll identify them.

2 You know, at the end of the day, your Honor, I think
3 that there are certainly two victims that we, I think, have
4 very, very well documented losses for. That's Mr. Koch and
5 Mr. Fascitelli.

6 THE COURT: And that total is, roughly?

7 MR. HERNANDEZ: Almost \$8 million. And I think our
8 argument, as a fall-back argument here, because it is difficult
9 to calculate some of these losses for different reasons, is
10 that if your Honor concludes that they suffered approximately
11 \$8 million worth of losses -- and there are some other
12 individuals with very, very clear losses, they are just smaller
13 amounts -- and that the intended loss in this case is in excess
14 of \$13 million, based on consignments and based on what was
15 found in the home, that already puts you into the 20 to
16 50 million-dollar range.

17 We're not interested in unnecessarily creating
18 disputed issues of fact over losses that may be too difficult
19 to pin down. So we'll try and resolve those differences and
20 make it clearer.

21 THE COURT: Right. So that was going to be my next
22 question, that we'll be able to resolve all those issues Mr.
23 Mooney and Mr. Hernandez, on the papers? Or is there going to
24 have to be some sort of hearing. What is your thought about
25 that?

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1 MR. MOONEY: I don't know that we know that, your
2 Honor. We're probably okay with -- we'll be able to figure out
3 where we are with regard to the actual loss issue, with regard
4 to the things that are happening. And we're probably okay with
5 something in the neighborhood of the 8 million-dollar range. I
6 think where we probably have a lot of difficulty is with regard
7 to this sort of intended range, because there is so many things
8 that have been thrown into that that we think just are
9 improbable and just don't meet the level where the Court should
10 seriously consider them. But I don't know that that is the
11 sort of thing that would be the subject of a hearing, as much
12 as something we can probably adequately handle with briefing.
13 We have certainly given the Court a lot of briefing on those
14 subjects.

15 THE COURT: You certainly have. I have a 575 page
16 submission from you.

17 MR. MOONEY: I apologize for that. Also apologize
18 for, and deeply distressed with, Fed-Ex. We put that package
19 with Fed-Ex on Saturday, and find out that it didn't get
20 delivered to the Court until yesterday.

21 THE COURT: Yeah. Yeah --

22 MR. MOONEY: And they are supposed to be the gold
23 standard.

24 THE COURT: -- you can rest assured that we have it
25 all. I can't say we have absorbed it all, but we have it all.

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1 So, all right, I think that's it.

2 I have one other question. Do we anticipate any
3 victim testimony, or are we gonna have this all on letters or
4 submissions.

5 MR. HERNANDEZ: I don't think so, your Honor. I think
6 Mr. Koch's letter is -- I don't think he intends to attend in
7 person. And I have spoken to -- a couple of the wine makers at
8 one point had expressed an interest, but since they testified,
9 I don't think there is gonna be anything more.

10 THE COURT: Great, okay. So, all right, again, if you
11 would impress upon the probation department that I really need
12 this information. And also bring to their attention the dates
13 by which this is supposed to happen, which are set forth in the
14 order dated May 27, 2014, then we'll be in pretty good shape,
15 it seems to me.

16 MR. HERNANDEZ: We'll do that.

17 THE COURT: Okay.

18 So now the question is what is the alternative
19 sentence date. I think Mr. Mooney was hoping for a date in mid
20 July. I think I can accommodate that. Let me propose one to
21 you and see if this works. I think it is a Thursday. It's
22 July 17th at 9:30; is that workable for all of you?

23 MR. MOONEY: Yes, your Honor.

24 MR. HERNANDEZ: It's acceptable for the government,
25 your Honor. Since Mr. Kurniawan is in custody, I don't know if

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1 the marshals can produce him right at 9:30.

2 THE COURT: I'll work on that. I think they should be
3 able to do that.

4 So, okay, anybody have anything else they want to
5 discuss?

6 MR. HERNANDEZ: No. Thank you.

7 THE COURT: Good. This is very helpful.

8 And I think this will give rise to a better record for
9 sentencing when we get this information nailed down.

10 Thanks. Nice to see you all.

11 MR. HERNANDEZ: Thank you.

12 MR. MOONEY: Thank you.

13 (Adjourned)